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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 621

JAMES OLIVER, ET AL., *Petitioners,*

v.

STEWART L. UDALL, Secretary of the Interior, *Respondent.*

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, AMICUS CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

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Counsel for the parties have consented in writing to the filing of a brief in the above-entitled case on behalf of the Association on American Indian Affairs, Inc., as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs is a nationwide organization of American citizens of which Oliver La Farge of Santa Fe, New Mexico, is President. The Association has as one of its chief purposes the safeguarding of the rights of American Indians. The interest of the Association in the instant case is to assist this Court in seeing that the rights vested by the Constitution and laws of the United States in Indians residing on the Navajo Reservation

are as fully protected as the rights of any of their fellow-citizens.

The object of this *amicus curiae* brief in support of the petition for certiorari is to illuminate a basic misconception by the court below concerning the legal status of reservation Indians. More specifically, and contrary to the lower court's assumptions, the Association maintains that the Secretary of the Interior is not exempt from ordinary limitations upon the powers of Federal officials on any theory that powers of Indian tribal governments are not restricted by the guarantees of religious freedom set forth in the United States Constitution. It is respectfully submitted that our discussion will materially aid the Court's consideration of the second question presented in the instant case—a question which possesses significance far beyond the outcome of this litigation.

REASONS FOR GRANTING THE WRIT

Underlying the decision below absolving the Secretary of the Interior from responsibility for an infringement upon the religious freedom of reservation Indians is the erroneous assumption that the provisions of the Federal Constitution protecting personal liberty and individual property rights do not apply to the acts of Indian tribes. This belief stems from an unwarranted extension of this Court's holding in *Talton* v. *Mayes*, 163 U.S. 376 (1896), that the Fifth Amendment requirement of grand jury indictment does not govern the operations of tribal courts. In a number of instances, the lower Federal courts have extended the rationale of the *Talton* ruling, which involves a remedial right, to negate fundamental rights of reservation Indians under the Constitution. See *e.g.*, *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir.

1957); *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (10th Cir. 1959).

The instant case, therefore, presents this Court with an opportunity to reexamine the tenuous holding of *Talton* and to instruct the lower Federal courts that Indian citizens are not without legal recourse in the face of arbitrary or discriminatory tribal action. The *Talton* rule springs from the thesis, articulated at length twelve years earlier in *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884), that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." That specific language of *Elk* v. *Wilkins*, however, was effectively discredited in 1960 by this Court in *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 115-119 (1960). See also *Navajo Tribe* v. *N.L.R.B.*, 288 F. 2d 162, 164-65 (D.C. Cir. 1961). If general acts of Congress now do apply to Indians within their reservations, it cannot logically be said that the Constitution nonetheless does not. See *Kinsella* v. *United States*, 361 U.S. 234 (1960); *Reid* v. *Covert*, 354 U.S. 1 (1957).

CONCLUSION

In view of the foregoing, *amicus curiae* respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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